

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT ("Agreement") is made and entered into on this ____ day of ____, 2012, by and between PACETTA, LLC, A Florida Limited Liability Corporation; DOWN THE HATCH, INC. and MAR-TIM, INC., (Hereinafter referred to as "PACETTA") and THE TOWN OF PONCE INLET, A Florida Municipal Corporation (Hereinafter referred to as "TOWN").

WHEREAS on May 10, 2010, PACETTA filed suit against the TOWN in four counts, Pacetta v. Town of Ponce Inlet, Case No. 2010-31696-CICI, Count I - Unconstitutional "Taking/Inverse Condemnation; Count II – Denial of Substantive Due Process and Equal Protection; Count III – Denial of Procedural Due Process and Count IV – Bert J. Harris, Jr. Claim, §70.001, Fla. Stat. and the TOWN filed Answers and Affirmative Defenses denying all claims, and;

WHEREAS, the parties hereto conducted a twelve (12) day bench trial before the Honorable William Parsons resulting in an Order Partially Finding in Favor of the Plaintiffs, PACETTA, LLC, DOWN THE HATCH, INC., and MAR-TIM, INC. and Against the TOWN OF PONCE INLET on the Issues of Liability and Reserving for Jury Trial the Appropriate Determination of any Sums Due as a Result Thereof, dated April 20, 2012, and;

WHEREAS, Judge Parsons' Final Judgment found the TOWN had unconstitutionally inversely condemned/"taken" the properties of PACETTA and "inordinately burdened" the

properties of PACETTA in violation of §70.001, Fla. Stat., known as the Bert J. Harris, Jr. Act, and;

WHEREAS, the parties have agreed to resolve their differences with respect to all claims that have been asserted against each other in the above-styled cause, providing for the payment of funds by the TOWN to PACETTA and initiating a process to provide and restore entitlements and vested rights to PACETTA allowing for a reasonable use of their property, and;

WHEREAS, the parties acknowledge and desire to resolve this matter pursuant to § 70.001, Fla. Stat., the Bert J. Harris, Jr. Act and in accordance with its terms.

WHEREAS, no party to this agreement is relying upon any statement of representation of the other party or any attorneys representing them as an inducement or basis for the agreement set forth herein, other than statements and representations expressly set forth herein.

NOW THEREFORE, in consideration of the foregoing covenants, and for other good and valuable consideration, the receipt and sufficiency of which is hereby expressly acknowledged, PACETTA and the TOWN hereby covenant and agree as follows:

I. PAYMENT

- a) The TOWN agrees to pay Thirty-five Million (\$35,000,000) to PACETTA in the following manner: Within ten (10) days of the execution of this agreement by the parties, the TOWN will deposit in the escrow account of Heebner, Baggett, Upchurch, and Garthe, PL, 523 N. Halifax Ave., Daytona Beach, FL, 32118 ready funds in the amount of Two-Million Dollars (\$2,000,000). These monies may be disbursed by the escrow agent as may be requested by PACETTA and the TOWN will have no further title ownership of said funds and are non-refundable under any and all circumstances. By December 31, 2012, the TOWN will deposit additional funds in the amount of Two-Million Dollars (\$2,000,000) which shall be non-refundable in all circumstances.
- b) The TOWN hereby agrees to pay PACETTA the balance of Thirty-One Million Dollars (\$31,000,000) pursuant to the following schedule:
 - i. The payment of the balance of Thirty-One Million Dollars (\$31,000,000.00) will be

- amortized over thirty-one (31) years with the first annual payment being due and payable on November 15, 2013, and every November 15 for the next consecutive thirty-one (31) years. The remaining principal will accrue interest at the rate of the prime rate as published by the Wall Street Journal and will be recalculated each November 15. Interest and principal will be due and payable each November 15.
- ii. All funds will be paid into the escrow account of Heebner, Baggett, Upchurch, and Garthe, P.L. or such other persons as may be designated in writing by PACETTA.
 - iii. Upon receipt of the final payment, PACETTA will execute a full and complete release of all of its claims against the TOWN arising out of Pacetta v. Town of Ponce Inlet, Case No. 2010-31696-CICI.
 - iv. If any payment required by this agreement is not timely made, upon ten days (10) written notice by PACETTA to TOWN, and if uncured within ten (10) days, will result in a termination of this Settlement Agreement, a forfeiture of all of the funds paid under this Agreement and PACETTA shall be entitled to an immediate judgment against the TOWN for the entire unpaid balance and accrued interest to which the TOWN can assert NO defense other than payment. Said judgment will provide for immediate execution on the assets of the TOWN reduced by the sums paid by the TOWN to PACETTA.

II. ENTITLEMENTS

- a) The parties hereto acknowledge that PACETTA, LLC has discounted the settlement price significantly and agreed to finance the TOWN's payments to PACETTA in exchange for promises and covenants by the TOWN to provide appropriate text and design modifications to the TOWN's Comprehensive Land Use Plan and Land Use Development Code (LUDC), tree ordinances, and overlay districts that would allow PACETTA to develop its property generally in accordance with the overall conceptual development plan, a copy of which is attached hereto as Exhibit "A".
- b) As described hereafter, several development related entitlements must occur for PACETTA to restore the investment-grade nature of PACETTA's property and mitigate in part the losses associated with the claims herein. The overall objective of the entitlements is to preserve and enhance a vibrant working waterfront, one that is based on a multi and mixed use village concept of maritime, residential, and business uses and is reasonably sensitive to the surrounding natural and built environment.
- c) Development perimeters will be generally as shown on the table hereafter.

Pacetta LLC Property - Required Development Parameters

Development Category or Characteristic	Site Parameter	Site Applicability	Notes and Comments
Total Site Area	16.02	Entire site	
Permitted Uses by Right	All uses in B-1 & B-2, R-1 through MF-2 Zoning Categories; Enclosed Dry Stack Boat Storage	Entire site	Residential, Maritime, Commercial, Dry Boat Storage, Bed & Breakfast. Refer to settlement document text for further guidance. Uses may be comingled throughout entire property and in individual buildings.
Residential Density	8 DU's/Acre	Entire site	Residential uses may be clustered throughout property; Maximum 128 Residential Units. Boatel Units <u>not</u> counted against residential density. Short Term Rental Units Allowed. If residential uses are placed on previously commercially zoned land, residential set backs would apply.
Maximum Impervious Surface Ratio (ISR)	0.7	Entire site	Overall maximum as applied to the entire property. Buildings, parking areas, and squares; docks and boardwalks not included in max ISR calculation
Maximum Floor Area Ratio (FAR)	0.5	Entire site	Overall maximum as applied to the entire property. Maximum Interior Square Footage All Buildings = 350,000 square feet
Minimum Floor Area per Building	500	Entire site	Generally applied to service and other non-residential buildings.
Minimum Square Footage for Residential Unit	800	Residential Area	Does not apply to Boatel units
Maximum Building Ground Floor Footprint	60,000	Marine/Dry Stack Storage	
	20,000	Residential Area	
	10,000	All Other Uses/Activities	
Parking Requirements	Per Code	Entire site	Mixed Use Parking Reduction Allowed; On-Street Parking Allowed on public and private streets
Maximum Building Height	35'	Entire site	Cupolas, Towers and Shielded Service Equipment may extend 10' above max bldg height provided that such items are less than 100 square feet per item and are architecturally compatible with building; maximum of three items per building.
Minimum Perimeter Buffer Width	25'	Entire site	Applied to any Non-Waterfront Site Perimeter
Minimum Waterfront Setback	10'	Entire site	Docks, Boardwalks, Paths and Seating Areas may encroach
Minimum Building Separation	15'	Within 50' of Waterfront	Minimum required building separation to promote clustering and preservation of tree canopy and root system
	10'	All Other Areas	
Minimum Yard Setbacks	None	Entire site	
Stormwater Management System	Open Swale, Surface Pond	Entire site	Surface stormwater system may be included in open space calculation
Tree Protection Standard	Volusia County	Entire site	Reasonable efforts made to preserve healthy trees (oak > 12" dbh, cedars > 8" dbh)

Source: Community Design Associates (6/12)

- d) The TOWN acknowledges and agrees that the uses conceptually shown on Exhibit "A" are vested rights of PACETTA. To that end, the TOWN will amend, modify or eliminate its Comprehensive Land Use Plan (LUDC), Planned Waterfront Development (PWD) Regulations, Riverfront Overlay District (ROD), Tree Preservation Ordinance, and other ordinances that may require modification to allow the uses, dimensions and densities generally depicted on Exhibit "A" and as described in this Agreement.
- e) The TOWN agrees that that following parcels are under a unified ownership as defined by the rules and regulations of the TOWN and acceptable for a multi-use overall development plan pursuant to a zoning district or Master Developer's Agreement (MDA) or the like.

Parcel ID

6430-03-05-0060 Mar-Tim
 6430-03-05-0070 Mar-Tim
 6430-03-01-0040 Buffer
 6430-03-01-0040 Mar-Tim (former Docksider)
 6430-03-04-0050 Mar-Tim (former Docksider)
 6437-03-00-0010 Pacetta (former Old Florida Club)

6437-03-05-0030 Pacetta (Sailfish house)
6434-03-00-0040 Pacetta (Sailfish)
6430-03-01-0010 Down the Hatch
6430-03-01-0011 Down the Hatch

- f) Within ninety (90) days of the execution of this Agreement the TOWN will eliminate the Riverfront Overlay District (ROD), Ordinance 2003-16.
- g) The parties hereto agree that the use of the Down the Hatch Restaurant and associated dockage facilities, the Sea Love Boat Works and Sea Love Marina are grandfathered uses and thus may be replaced, substantially remodeled, or repaired in accordance with the standards of the Florida Building Code in effect in the TOWN so long as no more than 25% of the physical building is being modified.
- h) Within Sixty (60) days of execution of this Agreement the TOWN will execute a definitive Developer's Agreement which will include the following modifications to its Comp Plan, LUDC, Land Use Development Code, Riverfront Overlay District (ROD), Tree Preservation Ordinance, Planned Waterfront Development (PWD), that will allow for and accommodate the vested rights development as shown on Exhibit "A" and described in this Agreement with reasonable regulations and restrictions to accommodate PACETTA's ability to create a reasonable investment-backed expectation for development as shown on Exhibit "A" and described in this Agreement. This document will be submitted to the Circuit Court for approval as provided by § 70.001(d) 1,2, Fla. Stat.
- i) Within One Hundred Twenty (120) days of the execution of this Agreement, the parties hereto will enter into a Master Development Agreement (MDA) that will provide for mixed uses/multiple uses of aquaculture, commercial retail, residential single family, multi-family, restaurants, public institution, education, marine education, offices, marine-oriented uses, dry stack boat storage, wet-slip marina, boatel, marine-industry (light) marine mechanic, with no limitation on engine size or horsepower, boat landing and markets. No limitations on use within the properties' boundary or water frontage or within the building envelope beyond what is outlined herein will be imposed by the TOWN. These mixed uses shall reflect the TOWN's working waterfront preservation, prioritizing water dependent uses and water enhanced uses. PACETTA shall have the right to mix all uses within its development of all properties with its primary uses geared towards the preservation and enhancement of a vibrant working waterfront, utilizing a mix of uses to obtain such a goal. These developments will include reasonable regulations which will promote a vibrant working waterfront regarding parking, flow of traffic, abatement of noise and fumes, appropriate vegetative buffering and the like from neighboring residential uses.
- j) For a residential component, the TOWN will agree that PACETTA has vested rights to one hundred (100) units spread over the entire sixteen (16) acres in accommodation of single family R-1 or multi-family MF-2, those uses being consistent with surrounding uses. The

TOWN will require its flood plain regulations on PACETTA's land to provide for residential development on all of PACETTA's property to the extent it is consistent with FEMA regulations.

- k) The parties hereto agree that PACETTA has a vested right to marine fueling facilities, (other than Bunker C), and sanitary pumping lift stations installed with all state and county regulations that may apply.
- l) PACETTA has a vested right to a boatel and upland support facilities for the marina on their land with no limitations on room or floor square footage, with the maximum building height of Thirty-Five (35) feet. The parties hereto agree that PACETTA has vested rights to One Hundred Thirty (130) additional wet slips on all lands submerged or by riparian ownership under the controlled ownership of PACETTA. Wet slips and wet slip locations may be allocated by PACETTA over its property consistent with federal and state permitting regulations. PACETTA shall have the right to move or exchange additional slips from allocation entitlements from the TOWN's slip pool or from dry storage entitlement pursuant to TOWN's Ordinance 2007-28 adopted October 17, 2007. No wet or dry slip allocation will have any expiration period.
- m) The parties hereto agree that PACETTA has a vested right to construct a dry stack boat storage facility which is generally defined as a building storing boats in an upland location also known as dry stack storage, in the minimum amount of Two Hundred Thirteen (213) slips. This boat slip allocation will NOT have an expiration date. No restrictions or regulations to land use and/or zoning shall diminish the Two Hundred Thirteen (213) dry slip allocations in a single enclosed building adequate to provide dry stack boat storage for a minimum of Two Hundred Thirteen (213) boats. A minimum of Thirty (30) foot building set-backs will be placed between residential uses not associated with PACETTA's buildings. The structural design will include an enclosed facility protected by a fire suppression system. It will be designed with a building façade and architectural features facing any public right-of-ways. PACETTA will have the authority to choose or move or receive additional slips from allocation entitlements from the TOWN slip pool or from wet slip entitlement per TOWN's Ordinance 2007-28, adopted October 17, 2007. All dry slips will meet all state and county permitting requirements.
- n) As a part of the approval of PACETTA's mixed-use development, the TOWN will vacate Front Street, reverting said land to the control and ownership of PACETTA. Beach Street shall be vacated at the property line and boundary of its intersection with PACETTA owned lands.
- o) Within Thirty (30) days of execution of this Agreement, the TOWN will convey the property known as Elbers Sunset Park and the TOWN property known as 143 Beach Street, parcel ID #30-16-34-03-04-0040 to PACETTA, LLC. These properties shall become part of the unified ownership of PACETTA. The TOWN agrees to change the zoning of those transferred properties to a B-2 commercial to be consistent with the surrounding property

and said property would fall under the same terms and conditions contained in this Agreement and the future Master Plan.

- p) During the term of this Settlement Agreement, and until the settlement amounts are paid in full, the TOWN will abate all Ponce Inlet portions of ad valorem property taxes, franchise agreement fees, excise taxes and any other specialty taxes imposed by the TOWN.
- q) In its development, PACETTA will meet all of the parking requirements of the TOWN standards, but shall be permitted to locate and place parking to properly serve the uses within the confines of the property and would be identified through a master parking analysis prepared by a qualified traffic planner. Reduction of parking space is based on a shared parking analysis performed with a parking plan will be permitted as a means to reduce excess parking that may be required under existing TOWN standards.
- r) The parties hereto agree that within One Hundred Twenty (120) days of the execution of this Agreement, the parties will enter into a definitive Master Development Agreement incorporating the terms and conditions contained in this Agreement. If a definitive Master Development Agreement is not approved within One Hundred Twenty (120) days of the execution of this Agreement, the TOWN will agree to a judgment against them in the amount of Fifty-Four Million Dollars (\$54,000,000) for which let execution issue. However, the TOWN will be responsible for PACETTA's engineering fees, design fees and attorney's fees incurred in the approval process contemplated by this Agreement.
- s) This Agreement must be approved by the TOWN Council within Thirty (30) days of the submittal of the Agreement to the TOWN.
- t) Pursuant to the authority of § 70.001(c)(d), Fla. Stat., the parties are entering into this settlement agreement allowing for both variances, special exceptions and other extraordinary relief to effectuate the written agreements contained herein. As this agreement will require modification, variances or special exceptions to the application of rules, regulations or ordinances of the Town and would have the effect of contravening the application of certain statutes including chapter 163, Fla. Stat., the parties agree to jointly file actions in the existing Circuit Court case, Pacetta, LLC. v. Town of Ponce Inlet, Case No: 2010-31696-CICI, for approval of the Settlement Agreement by the Court to insure that the relief granted protects the public interest served by the statute at issue and is the appropriate relief necessary to prevent the governmental regulatory effect from inordinately burdening the real property.
- u) The Parties agree that if a final, non-appealable approval of this Settlement Agreement has not been granted by a court of competent jurisdiction by December 1, 2012, either party may terminate this Settlement Agreement, by giving notice within five (5) business days, except that if the only pending issue is a third party challenge, the Parties shall have an additional two months, until February 28, 2013, to resolve such challenge prior to exercising their right to terminate this Settlement Agreement, by giving notice within five (5) business days. The Parties retain the right to modify this Settlement Agreement as

may be necessary to effectuate the intent of the Parties in the future upon mutual written agreement.

III. MISCELLANEOUS.

- a) In that this Settlement Agreement requires the modification of certain regulations and ordinances affecting the property of PACETTA, the parties hereto agree to jointly file a motion in this cause for approval of the Settlement Agreement by the Court to ensure that the relief granted protects the public interest served by the statute at issue and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property consistent with 70.001(4) (d) 2, Fla. Stat.
- b) Binding Effect. The Parties agree that this Agreement and all its terms, covenants and conditions shall be binding on and shall inure to the benefit of the Parties hereto and to their respective transferees, heirs, personal representatives, successors and assigns.
- c) Written Modification. This Agreement (including Exhibits attached hereto, the terms of which are incorporated herein by reference) contains the final and entire understanding between the Parties hereto and neither they nor their agents shall be bound by any terms, conditions or representations not herein contained in writing. This Agreement may not be modified or changed orally, but only by an agreement in writing signed by the party against whom enforcement of any such change is sought.
- d) Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.
- e) Applicable Law. This Agreement shall be governed by the laws of Florida. Venue for any claim arising from this Agreement shall be Volusia County, Florida.
- f) Attorneys' Fees. In the event of litigation arising from the terms of this Agreement, the prevailing party in such litigation, including any appeals, shall be entitled to his reasonable attorneys' fees.
- g) Headings. The titles of the sections are inserted as a matter of convenience and for reference and in no way define, limit or describe the scope of the Agreement or the intent of any provision thereof.
- h) Interpretation. Whenever the context hereof shall so require, the singular shall include the plural, and vice versa and the male gender shall include the female and neuter gender and vice versa.
- i) Severability. In case one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof, and this

Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

- j) No Waiver; Cumulative Remedies. No party shall be deemed to have waived any right, approval, performance, condition precedent or any other term or condition set forth in this Agreement unless such party shall have executed a written waiver thereof. No failure by any party to exercise and no delay in exercising any right, power or privilege under this Agreement shall operate as a waiver thereof nor shall any single or partial exercise of any right, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, power or privilege.
- k) Acknowledgment. The parties hereto acknowledge that they have carefully read and understand this agreement. The parties hereto also acknowledge that they enter into this agreement voluntarily, with full knowledge of its significance, and without any pressure or coercion. The parties hereto further acknowledge that they have had the opportunity to negotiate regarding the terms of this agreement, and have had the opportunity to receive full and adequate legal counsel regarding its terms.

IN WITNESS WHEREOF, the undersigned have set their hands and seals on this ____ day of _____, 2012.

Signed, sealed and delivered
in the presence of:

Witnesses:

By: _____
Print Name: _____

DRAFT
By: _____
Lyder Johnson, PACETTA, LLC

By: _____
Print Name: _____

DRAFT
By: _____
Simone Johnson, PACETTA, LLC

By: _____
Print Name: _____

DRAFT
By: _____
Tami Lewis, Vice-Mayor

By: _____
Print Name: _____

DRAFT
By: _____
Scott Meacham, Councilmember

DRAFT

By: _____
Print Name: _____

By: _____
Mary Hoss, Councilmember

DRAFT

By: _____
Print Name: _____

By: _____
Joe Perrone, Councilmember

The TOWN OF PONCE INLET, FLORIDA
DRAFT

Approved as to form and legality:

By: _____
Gary Smith as Mayor

DRAFT

Clifford B. Shepard, Town Attorney

DRAFT

Noah C. McKinnon, Jr, Town Attorney

DRAFT

ATTEST: _____
Jeaneen Clause, Town Manager

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